Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THOMAS PAGE, Warden,

Petitioner,

v.

JERRY MAHAFFEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. What is the standard of review an appellate court should apply when reviewing a trial court's finding that the opponent of peremptory challenges has not established a *prima facie* case under *Batson v. Kentucky*, 476 U.S. 79 (1986)?

II. Whether, by itself, the number of peremptory challenges used against members of a particular race or sex is sufficient to establish a *prima facie* case?

III. Whether an appellate court may, if the record is sufficient, conduct the step-two and step-three inquiries under *Batson* if it determines that the trial court improperly failed to find that a *prima facie* showing was met?

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OPINIONS BELOW

Petitioner respectfully petitions for a writ of certiorari to review the November 19, 1998 decision of the United States Court of Appeals for the Seventh Circuit, published at 162 F.3d 481 (7th Cir. 1998), and reprinted in the appendix to this petition. (App. A). The judgment reversed the denial of a petition for writ of habeas corpus challenging Respondent's convictions for the murders of Dean and Jo Ellen Pueschel and the attempted murder and aggravated battery of their eleven-year-old son, Richard, as well as his convictions for home invasion, rape, armed robbery, residential burglary and theft, and the death sentence imposed for the murder convictions. Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc was denied on January 15, 1999 with the Honorable Joel M. Flaum, one of the judges on the original panel, voting to grant rehearing. (App. B).

The original panel decision of the Seventh Circuit, which affirmed the District Court with one dissent, issued on August 6, 1998, is published at 151 F.3d 671 (7th Cir. 1998), and is reprinted in the appendix to this petition. (App. C). All of the members of the original panel voted to grant the Respondent's Petition for Rehearing in an order issued on October 26, 1998 and published at 160 F.3d 1139 (7th Cir. 1998). (App. D).

The memorandum opinion and order of the District Court denying the petition for writ of habeas corpus, published at 978 F.Supp. 762 (N.D. Ill. 1997), and reprinted in the appendix to this petition, issued on September 4, 1997 and was docketed on September 5, 1997. (App. E). The District Court's denial of Respondent's timely Motion to Alter or Amend the Judgment issued on November 14, 1997 and was docketed on November 18, 1997. (App. F). On December 18, 1997, the District Court issued a certificate of probable cause or, in the alternative, of appealability. (App. G).

The decision of the Illinois Supreme Court affirming Respondent's convictions and death sentence, filed on April 20, 1989, is published at 128 Ill. 2d 388, 539 N.E.2d 1172, 132 Ill. Dec. 366 (1989), and is also reprinted in the appendix to this petition. (App. H).

JURISDICTION

The Court of Appeals for the Seventh Circuit issued its opinion on rehearing on November 19, 1998. The Seventh Circuit issued a stay of its mandate until April 19, 1999. The Petition for Rehearing with Suggestion for Rehearing En Banc was denied on January 15, 1999. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. State Court Proceedings

On August 29, 1983, in the early morning hours, Dean and Jo Ellen Peuschel were murdered in their Chicago home. Their eleven-year-old son, Richard, who was stabbed with a knife and clubbed with a baseball bat, was left for dead but survived the attack. (App. C3). Dean Peuschel was stabbed numerous times and clubbed over the head with his son's baseball bat. (App. C3). Jo Ellen was raped, sodomized, and beaten in the head with the

butt of a pistol, which caused her death. (App. C3). Richard saw his mother crying as she was being struck, and then either passed out or was himself struck. (R. 2387, 2390, 2451).[1] In court, Richard identified Respondent Jerry Mahaffey and his brother, Reginald, as the two men who attacked him and murdered his parents. (R. 2394).

Respondent, in a written confession, admitted trying to suffocate, strangle and choke Richard Peuschel. He admitted that he clubbed the boy with his own little league baseball bat (R. 2947-48), and that he and his brother, with another baseball bat, simultaneously clubbed Dean Peuschel over the head. (R. 2949). He further admitted that he watched his brother rape Jo Ellen and beat her with a pistol as she was lying on the floor next to her son. (R. 2950).

Respondent and his brother took numerous items of personal property from the Peuschel home. Many of the items were recovered from the bedroom closet of Respondent's apartment and were identified, in court, by family members as belonging to either Dean, Jo Ellen or Richard Peuschel. (R. 2230, 2380, 2382-83) A gun belonging to Dean Peuschel was recovered from Reginald Mahaffey, and blood on the gun was subsequently determined to be the same type as Jo Ellen Peuschel's. (R. 2818).

Respondent was tried jointly with his brother and found guilty by a jury of the murders of Dean and Jo Ellen Peuschel, the attempted murder and aggravated battery of Richard, home invasion, rape, armed robbery, residential burglary and theft. The jury found Respondent eligible for the death penalty and found no mitigating factors sufficient to preclude imposition of death. (R. 4309-11).

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[1] "R." refers to the record from Respondent's state court trial which was filed in the Seventh Circuit.

On April 30, 1986, while Respondent's appeal was pending in the Illinois Supreme Court on direct review, this Court issued its decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). In light of *Batson* and *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Illinois Supreme Court, on October 26, 1987, issued a supervisory order in Respondent's case directing the trial court to conduct an expedited hearing to permit Respondent to present evidence to substantiate his claim of unconstitutional discrimination in the exercise of peremptory challenges. (App. H4). The supervisory order also provided that if the trial court found that a *prima facie* showing of discrimination was made, it should then determine whether or not there was a race-neutral explanation by the State for the exercise of the questioned challenges. (App. H4). The trial court conducted the hearing on November 30, 1987, and found that Respondent had failed to establish a *prima facie* case of discrimination. (App. H4).

On the return of Respondent's case to the Illinois Supreme Court, he raised several issues including whether the trial court erred in finding that he failed to establish a *prima facie* case of discrimination under *Batson*. The facts which the state high court found relevant to the resolution of Respondent's *Batson* claim appear in its opinion at 128 Ill. 2d at 406-09, 539 N.E.2d at 1180-82. (App. H6-20).

In analyzing Respondent's *Batson* claim, the Illinois Supreme Court found that he had met the first element of the test for establishing a *prima facie* case—he is black and the State exercised peremptory challenges to remove from the venire certain members of his race. (App. H25). Therefore, the only question remaining was "whether, considering 'all relevant circumstances,' he ha[d] established a *prima facie* case of discrimination." (App. H25).

The state high court noted that the "relevant circumstances" a trial court may consider when determining

whether a *prima facie* case of discrimination has been established include: a pattern of strikes against black veniremen; the prosecutor's questions and statements during *voir dire* and in exercising challenges; the disproportionate use of peremptory challenges against blacks; whether the excluded blacks were a heterogeneous group sharing race as their only common characteristic; the level of black representation in the venire as compared to the jury; the race of the defendant and the victim; and the race of the witnesses. (App. H25-26). The court cautioned, however, that the trial court "'must avoid arbitrarily deciding this delicate question solely from the number of blacks peremptorily challenged.'" (App. H26).

The Illinois court noted that at the *Batson* hearing, the State gave criteria, apparent from the record, for challenging the African-American veniremen, asserting that the criteria applied to all veniremen regardless of race. (App. H19). In response to Respondent's argument that the trial court's reliance on "'apparent explanations'" for the State's challenges demonstrates that the trial judge "'confused the [Respondent's] duty to present a *prima facie* case *** and the prosecutor's duty to explain the challenges once a *prima facie* case is established,'" the state high court determined that "rather than relying on the 'apparent explanations' for the State's challenges, the trial court merely reviewed the characteristics of the stricken jurors to determine their heterogeneity to the jurors who ultimately sat. The state high court concluded that this is a relevant circumstance which a trial court may consider when determining a *prima facie* case of discrimination." (App. H27).

Finally, the state supreme court addressed Respondent's claim that the trial court had improperly considered his previous experience with one of the Assistant State's Attorneys. The high court concluded that "the record shows that the trial judge used his experience, as well as his

superior knowledge of local conditions and prosecutors, in determining that the State's peremptory challenges were not motivated by impermissible racial-group bias." (App. H28). The court saw no reason to disturb this finding.

Concluding that the trial judge's finding that Respondent failed to establish a *prima facie* case of discrimination was not against the manifest weight of the evidence and rejecting the remainder of Respondent's claims, the Illinois Supreme Court affirmed Respondent's convictions and death sentence. This Court denied a petition for writ of certiorari in *Mahaffey v. Illinois*, 497 U.S. 1031 (1990).

Respondent then initiated state post-conviction proceedings. His claims were dismissed without an evidentiary hearing, and the Illinois Supreme Court affirmed in *People v. Mahaffey*, 165 Ill. 2d 445, 651 N.E.2d 174 (1995). This Court denied a petition for writ of certiorari in *Mahaffey v. Illinois*, 516 U.S. 977 (1995).

B. Federal Habeas Corpus Proceedings

On November 14, 1995, Respondent filed a petition for writ of habeas corpus in the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. § 2254. The District Court, who had jurisdiction pursuant to 28 U.S.C. § 2241, denied the petition. In rejecting Respondent's *Batson* claim, the District Court found "no reason to doubt the correctness" of the state trial judge's factual finding regarding the existence of a *prima facie* case. (App. E47).

Respondent appealed the denial of habeas relief to the Seventh Circuit, who had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. In the original panel decision in *Mahaffey v. Page* ["*Mahaffey I*"], the majority, the Honorable Judges Flaum and Cummings, found that with respect to the *Batson* claim, the state trial judge had "conducted a painstaking, thoroughly detailed analysis," and

only then "concluded that Mahaffey was unable to establish discriminatory motive on the part of the prosecution." (App. C16). The majority determined, however, that "the fact that the judge couched his finding in the context of a '*prima facie* showing' is of no consequence" in that "the prosecution bypassed this stage by proffering its non-discriminatory reasons." (App. C15). The majority consequently concluded that the state trial judge had decided the ultimate question of discriminatory intent, a finding of fact reviewed with great deference on appeal, and rejected Respondent's *Batson* claim accordingly. (App. C17-18).

Dissenting, the Honorable Illana Diamond Rovner stated that the only issue properly before the court "was whether Mahaffey had established a *prima facie* showing of discrimination." (App. C46). Finding that he in fact had, she concluded that "[t]he State of Illinois should once and for all be required to articulate its true reason for striking each of the seven African-American venire persons from the jury. . . ." (App. C51).

On October 26, 1998, the entire panel voted to grant rehearing. (App. D). On November 18, 1998, in its decision on rehearing ["*Mahaffey II*"], a majority of the panel, this time consisting of Judges Rovner and Cummings, reversed the judgment of the District Court and ordered the writ be granted unless, within 120 days, the state trial court holds a second hearing on Respondent's *Batson* claim. (App. A12-13).

Writing for the majority on rehearing, Judge Rovner substantially adopted her dissenting opinion in *Mahaffey I*. Specifically, she once again stated that the only issue properly before the court was "whether Mahaffey established a *prima facie* case of discrimination," a "mixed question of law and fact (citations omitted) which the appellate court should review de novo." (App. A8). Acknowledging that some of the federal circuits have utilized

a clearly erroneous standard in reviewing that question, Judge Rovner instead relied on this Court's decision in *Ornelas v. United States*, 517 U.S. 690 (1996), to support her conclusion that de novo review is appropriate. (App. A8). Moreover, although never challenging the *Mahaffey I* majority's view that the state trial judge had "conducted a painstaking, thoroughly detailed analysis," and purportedly "sensitive" to the fact that the state trial judge was present during the jury *voir dire* and found that all the relevant facts and circumstances did not produce an inference of discrimination, the majority nonetheless concluded that Respondent, "as a matter of law," had established a *prima facie* case of discrimination at the *Batson* hearing. (App. A12). It further found that "the most important factor of this case, and one that the Illinois courts were too quick to overlook, is that all seven African-American members of the jury venire were excused by the State." (App. A9). Finally, the majority noted that the standard of review in this case is "largely beside the point" because, "even if a more deferential standard were applied," it would have to conclude that the state trial judge "clearly erred" in finding that no inference of discrimination arose from the facts and circumstances of the case. (App. A9).[2]

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[2] Based on the analysis he advanced in the original panel decision, Judge Flaum dissented. (App. A13).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case raises several important issues with respect to claims brought pursuant *Batson v. Kentucky* and its progeny, including *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (applying *Batson* principle to gender-based discrimination), *Georgia v. McCollum*, 505 U.S. 42 (1992) (applying principle to peremptory challenges by criminal defendants), and *Edmonson v. Leeseville Concrete Co., Inc.*, 500 U.S. 614 (1991) (applying principle to private litigants in civil cases). First, the Seventh Circuit opinion in *Mahaffey II*, in holding that the issue of whether the opponent of the peremptory challenges has established a *prima facie* case of discrimination is to be reviewed de novo, conflicts with decisions of the First, Fourth, Fifth, Eighth, Ninth[3], and Eleventh Circuits (*see Brewer v. Marshall*, 119 F.3d 993, 1004 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 1172 (1998); *Johnson v. Campbell*, 92 F.3d 951, 953 (9th Cir. 1996); *United States v. Stewart*, 65 F.3d 918, 923 (11th Cir. 1995), *cert. denied sub nom. Daniel v. United States* 516 U.S. 1134 (1996); *United States v. Vasquez-Lopez*, 22 F.3d 900, 901 (9th Cir.), *cert. denied*, 513 U.S. 891 (1994); *United States v. Branch*, 989 F.2d 752, 755 (5th Cir.), *cert. denied sub nom. Thompson v. United States*, 509 U.S. 931 (1993); *United States v. Gordon*, 974 F.2d 97, 100 (8th Cir. 1992); *United States v. Casper*, 956 F.2d 416, 418 (3rd Cir. 1992); *United States v. Moore*, 895 F.2d 484, 486 (8th Cir. 1990); *United States v. Grandison*, 885 F.2d 143, 146 (4th Cir. 1989), *cert. denied*, 495 U.S. 934 (1990)), as well as with *Batson* itself which expressed confidence that "trial judges, experienced in *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie*

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[3] There is a conflict within the Ninth Circuit on the issue. *See Turner v. Marshall*, 63 F.3d 807, 814 n.4 (9th Cir. 1995).

case of discrimination. . . ." 476 U.S. at 96-97. Decisions from the Tenth Circuit, however, indicate that de novo review is appropriate. *See United States v. Joe*, 8 F.3d 1488, 1498 (10th Cir. 1993), *cert. denied*, 510 U.S. 1184 (1994); *United States v. Hartsfield*, 976 F.2d 1349, 1355-56 (10th Cir. 1992), *cert. denied*, 507 U.S. 943 (1993). Petitioner respectfully submits that it is important that the Court resolve this conflict.

In addition, the *Mahaffey II* opinion, in relying almost exclusively on the number of African-American veniremen excused by the State in concluding that the Respondent, "as a matter of law," established a *prima facie* case of discrimination, conflicts not only with *Batson* itself, but with decisions of the First, Third, Eighth, Ninth and Tenth Circuits.[4] *See United States v. Bergodere*, 40 F.3d 512, 516 (1st Cir. 1994), *cert. denied*, 514 U.S. 1055 (1995); *United States v. Esparsen*, 930 F.2d 1461, 1467 (10th Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992); *United States v. Dawn*, 897 F.2d 1444, 1448 (8th Cir.), *cert. denied*, 498 U.S. 960 (1990); *United States v. Clemons*, 843 F.2d 741, 746 (3rd Cir.), *cert. denied*, 488 U.S. 835 (1988); and *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir.), *cert. denied*, 484 U.S. 928 (1987). Decisions from the Second Circuit, however, indicate that numbers alone can be sufficient to establish a *prima facie* case under *Batson*. *See United States v. Alvarado*, 923 F.2d 253, 256 (2nd Cir. 1991); *United States v. Ruiz*, 894 F.2d 501, 505-06 (2nd Cir. 1990). Petitioner respectfully submits that it is important that that the Court resolve the conflict on this question as well.

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[4] There also appear to be conflicts within the Third, Eighth and Ninth Circuits on this question. *See Jones v. Ryan*, 987 F. 2d 960, 971 (3rd Cir. 1993); *United States v. Battle*, 836 F.2d 1085, 1085-86 (8th Cir. 1987); and *Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995).

This case also raises the question of whether an appeals court, based on the sufficiency of the record, may evaluate on its own whether the proponent of the peremptory challenges has satisfied steps two and three of the *Batson* inquiry when the trial judge determined only that the opponent of the challenges had failed to establish a *prima facie* case. This is a procedural question which two members of this Court—Justice Stevens and Justice Breyer—have indicated deserves further consideration. *See Purkett v. Elem*, 514 U.S. 765, 775-76 (1995) (Stevens, J., Breyer, J., dissenting).

Finally, Respondent was sentenced to death fourteen years ago. This case illustrates the disruptive effect the writ of habeas corpus can have on the need for finality when, after the state trial judge, the state supreme court, the United States District Court and the original majority of the Seventh Circuit panel hearing the cause all agreed that Respondent had not been denied his equal protection rights under *Batson*, the majority on rehearing decides to remand back to state court for yet a second *Batson* hearing—a decision which could easily delay execution of sentence in this case by at least four or five years, depending on the review procedures Respondent seeks following the hearing. "At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation." *Herrera v. Collins*, 506 U.S. 390, 426 (1993) (O'Connor, J., concurring). Petitioner respectfully submits that it appears necessary for this Court to reiterate that point and may effectively do so in this case.

ARGUMENT

I.

THE SEVENTH CIRCUIT OPINION, AS DO OPINIONS OF THE TENTH CIRCUIT, IMPROPERLY UTILIZES A DE NOVO STANDARD IN REVIEWING THE QUESTION OF WHETHER THE OPPONENT OF PEREMPTORY CHALLENGES ESTABLISHED A *PRIMA FACIE* CASE UNDER *BATSON* IN THE TRIAL COURT AND THEREBY CONFLICTS WITH DECISIONS OF A MAJORITY OF THE OTHER CIRCUITS, AS WELL AS *BATSON* ITSELF.

A. A Trial Court's Determination of Whether a *Prima Facie* Case Has Been Established Should Be Reviewed Under A Deferential Standard of Review.

This Court has clearly established that the determination of whether a prosecutor intended to discriminate on the basis of race, in challenging potential jurors, is entitled to great deference. *Hernandez v. New York*, 500 U.S. 352 (1991). That ultimate finding regarding intentional discrimination is entitled to great deference because it will turn primarily on the trial judge's evaluation of the credibility of the prosecutor's race-neutral reasons. *Id.* at 365. Likewise, whether the opponent of the peremptory challenges has initially established a *prima facie* case turns on an evaluation, peculiarly within the trial judge's expertise, of factors readily apparent to him or her during *voir dire*. As this Court stated in *Batson*, "We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie* case of discrimination. . . ." 476 U.S. at 96-97. Moreover, this Court noted in *United States v. Armstrong*, when referring to its consideration of "'the standards for assessing a *prima facie* case'" in *Batson*:

> During jury selection the entire res gestae take place in front of the trial judge. Because the judge

> has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a 'pattern' of singling out members of a single race for peremptory challenges. (Citation omitted). He is in a position to discern whether a challenge to a black juror has evidentiary significance.

517 U.S. 456, 467-68 (1996). It necessarily follows that a trial court's determination of whether a *prima facie* case has been established should also be accorded great deference.

As the Seventh Circuit opinion acknowledges, several of the Circuits utilize a deferential standard to review the question of whether a *prima facie* case has been shown, both in civil and criminal cases on direct and collateral review. *See Brewer v. Marshall*, 119 F.3d 993, 1004 (1st Cir. 1997) (following *United States v. Bergodere*, 40 F.3d 512, 516 (1st Cir. 1994), which held that because a *Batson prima facie* case determination is particularly fact-sensitive, it will be accepted unless clearly erroneous), *cert. denied*, 118 S.Ct. 1172 (1998); *Johnson v. Campbell*, 92 F.3d 951, 953 (9th Cir. 1996)[5] (according great deference to a trial court's determination regarding the establishment of a *prima facie* case because of the trial court's unique awareness of the totality of the circumstances, the factual nature of the determination, and the judge's ability to observe all of the parties); *United States v. Stewart*, 65 F.3d 918, 923 (11th Cir. 1995) (giving great deference to the trial court's finding as to the existence of a *prima*

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[5] There is a conflict within the Ninth Circuit, *see Turner v. Marshall*, 63 F.2d 807, 814 n.4 (9th Cir. 1995) (holding that although deference should be given to a state court's ultimate finding regarding discrimination, no deference is appropriate where the state court simply denied the existence of a *prima facie* case. *See also Wade v. Terhune*, 1998 U.S. Dist. LEXIS 6763, *9 (N.D. Ca. 1998) (agreeing in dicta that the *Turner* panel "was probably correct. . . .").

facie case), *cert. denied sub nom. Daniel v. United States* 516 U.S. 1134 (1996); *United States v. Branch*, 989 F.2d 752, 755 (5th Cir.) (holding that a finding that the defendant did not make a *prima facie* case of discrimination under *Batson* is reviewed for clear error), *cert. denied sub nom. Thompson v. United States*, 509 U.S. 931 (1993); *United States v. Casper*, 956 F.2d 416, 418 (3rd Cir. 1992) (holding that a trial court's determination that a defendant has failed to make a *prima facie* showing of discrimination in violation of the Equal Protection Clause will be reversed only if that determination is clearly erroneous); *United States v. Moore*, 895 F.2d 484, 486 (8th Cir. 1990) (noting that the *Batson* decision placed great confidence in a trial judge's ability to identify a *prima facie* case of race discrimination in holding that a trial court's ruling on the *prima facie* case is entitled to great deference); *United States v. Grandison*, 885 F.2d 143, 146 (4th Cir. 1989) (noting the "pivotal role" of the trial judge in determining a *prima facie* case under *Batson* and holding that such findings are entitled to great deference and will not be disturbed unless clearly erroneous), *cert. denied*, 495 U.S. 934 (1990).

The Tenth Circuit, however, utilizes a de novo standard of review. *See United States v. Joe*, 8 F.3d 1488, 1498 (10th Cir. 1993) (stating that "[t]his court reviews a challenge to the improper striking of prospective jurors based on their race de novo . . . ."), *cert. denied*, 510 U.S. 1184 (1994); *United States v. Hartsfield*, 976 F.2d 1349, 1355-56 (10th Cir. 1992) (same), *cert. denied* 507 U.S. 943 (1993).

The Seventh Circuit held that the preliminary question of whether a *prima facie* case has been shown presents a mixed question of law and fact, which appellate courts should review de novo. (App. A8). To be sure, confusion has arisen in lower state and federal courts regarding whether, because the *Batson prima facie* case determination involves a question of legal sufficiency, it is a ques-

tion over which appellate courts must have plenary review. *Compare Valdez v. People*, 966 P.2d 587, 1998 Colo. LEXIS 625, *14-15 (Colo. 1998) (holding that a *Batson prima facie* case determination involves a question of legal sufficiency over which the appellate court must have plenary review), *State v. Sledd*, 250 Kan. 15, 825 P.2d 114, 119 (Kan.) (same), *cert. denied*, 506 U.S. 849 (1992), *and State v. Butler*, 795 S.W.2d 680, 687 (Tenn. Crim. App. 1990) (same), *with United States v. Bergodere*, 40 F.3d at 516 (First Circuit case holding that even though the *Batson prima facie* determination can be characterized as a mixed question of law and fact, it is fact-sensitive, and, thus should be reviewed under the clear-error standard). Indeed, even if the question is a mixed one, this Court has reviewed mixed questions of law and fact on a deferential basis, "depending upon essentially practical considerations." *Ornelas v. United States*, 517 U.S. 690, 700 (1996) (Scalia, J., dissenting). *See Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) (citing examples of issues treated deferentially on review because, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue).

In considering the proper standard for reviewing whether a *prima facie* case under *Batson* has been established, some lower courts have also sought guidance from cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. *See Valdez*, 1998 Colo. LEXIS 625, *13-14; *Sledd*, 825 P.2d at 119; *Butler*, 795 S.W.2d at 687. However, a trial court which makes the *prima facie* case determination under *Batson* is in an even better position, vis-a-vis an appellate court, than in a Title VII case because the trial court's findings on the *Batson* issue stem from firsthand knowledge and observation of the *voir dire* proceedings. *See United States v. Grandison*, 885 F.2d at 146 (finding that district court's findings stemmed from firsthand knowledge and observation of the critical events and, therefore, was in a more advantageous position vis-a-vis

an appellate court, than in a Title VII case). Accordingly, the Title VII analogy is not entirely appropriate and further guidance from this Court on the question is necessary.

B. Ignoring *Batson's* Expressed Confidence in Trial Judges' Ability to Decide Whether A *Prima Facie* Case Has Been Established Threatens to Render Step One of the *Batson* Inquiry Nonfunctional and Thereby Risks Undermining the Contribution the Peremptory Challenge Makes to the Administration of Justice.

Ignoring the *Batson* Court's confidence in trial judges' ability to decide if circumstances concerning the use of peremptory challenges create a *prima facie* case of discrimination threatens to render the *prima facie* case requirement nonfunctional. *Batson* expressly requires that a trial court should not compel the prosecutor to reveal his or her motives for exercising peremptory challenges unless the defendant has raised an inference of intentional discrimination. In this way, *Batson* accommodates competing interests, balancing "the full peremptory character of the historic challenge" (476 U.S. at 97), which "occupies an important position in our trial procedures" (*id.* at 98), against the prevention of intentional discrimination in jury selection. *See* Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 *J. Crim. L. & Criminology* 1, 41 (1988). However, appellate disregard of a trial judge's finding of no *prima facie* case sends a message to trial courts which is inconsistent with the express language of *Batson*, encouraging apathy toward, as well as perhaps the elimination of, step one of the *Batson* inquiry. *See id.* Specifically, even if a defendant utterly fails to establish a *prima facie* case of discriminatory intent, a trial court may nonetheless feel compelled to inquire into the motives of the proponent of the challenge in order to protect the

ruling from upset on review. *See id.* at 41-42. If the *prima facie* case requirement is essentially eliminated, then *Batson* indeed "undermine[s] the contribution the challenge generally makes to the administration of justice." *Batson*, 476 U.S. at 98-99.

C. *Ornelas v. United States*, Which the Seventh Circuit Relied Upon To Support Its View That De Novo Review Is Appropriate, Is Inapposite.

The *Mahaffey II* majority's reliance on this Court's decision in *Ornelas*, in support of its conclusion that de novo review is appropriate, is misplaced. The Court in *Ornelas* made clear that "probable cause" and "reasonable suspicion" are reviewed de novo because the constitutional rules involved "acquire content only through application." 517 U.S. at 697. "Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, those legal principles." *Id.*, citing *Miller v. Fenton*, 474 U.S. at 114 (where the Court distinguished between cases in which the "relevant legal principle can be given meaning only through its application to the particular circumstances of the case," and those in which the issue involves credibility determinations or evaluations of demeanor, where the trial judge is thought to be in a far superior position to decide the question). Clearly, as argued above, whether or not a *prima face* case under *Batson* has been shown is a question of the latter species since the trial judge, with his or her expertise and superior familiarity with the issues and the parties, is better able to make the determination. Moreover, even in *Ornelas*, the Court made clear that a reviewing court must take care to review findings of historical fact only for clear error and to give "due weight to inferences drawn from those facts by resident judges" who "view[ ] the facts of a particular case in light of the distinctive features and events of the community[.]" *Id.* at 699. As Petitioner

illustrates below, the majority in *Mahaffey II* gave no such "due weight" to any factual finding or inference of the state trial judge below.

D. Had the Seventh Circuit Applied A Deferential Standard of Review, the Result of the Case Would Have Been Different.

The majority in *Mahaffey II* indeed professed its "sensitivity" to the fact that the state trial judge was present during *voir dire* and had found that all the relevant facts and circumstances did not produce an inference of discrimination. (App. A11). The majority even purported to alternatively engage in a more deferential review, stating that "if a more deferential standard were applied," it would have to conclude that the trial judge had "clearly erred." (App. A9). However, had the court truly shown deference to findings of the trial judge, it could not have arrived at the result it did.

This Court has held that "where the evidence would support a conclusion either way but . . . the trial court decided it to weigh more heavily for [one of the parties], such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous.'" *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). The District Court below concluded that the state trial judge might very well have "decided the question the other way, but on this record, given his participation in the jury selection, his judgment that there was no *prima facie* case was permissible." (App. E47). However, the *Mahaffey II* majority independently reviewed the totality of the circumstances and concluded that the facts in this case, "as a matter of law," required the State to come forward with race-neutral explanations for each of the challenged strikes. (App. A12).

Moreover, it cannot be ignored that this is a Section 2254 case in which the factual findings of the state courts

are presumed to be correct, and may be set aside only if they are "'not fairly supported by the record.'" *Purkett v. Elem*, 514 U.S. at 769, quoting 28 U.S.C. § 2254(d)(8). In order to reject the presumption of correctness, a federal habeas court must "more than simply disagree with the state court." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). Here, however, the majority in *Mahaffey II* did not even attempt to conclude that the state trial judge's finding of no *prima facie* case, or any of its subsidiary factual findings connected with that determination, were not fairly supported by the record. Moreover, the disagreement among various state and federal court judges who have examined this case, and the District Court's acknowledgment that the state trial judge could very well have "decided the question the other way," all indicate that the presumption of correctness should be enforced. *See Caldwell v. Maloney*, 159 F.3d 639, 655 (1st Cir. 1998). *See also Wainwright v. Goode*, 464 U.S. 78, 85 (1983) (noting the number of state and federal judges who had disagreed on the issue in question, stating that, "at best, the record is ambiguous," and concluding that "because both . . . conclusions find fair support in the record, we believe the [Eleventh Circuit] erred in substituting its view of the facts for that of the Florida Supreme Court").

1. The Majority in *Mahaffey II* First Ignored the Explicit Factual Finding of the Illinois Supreme Court that the State Trial Judge Had Conducted "A Detailed Analysis" of the Veniremen Which the State Had Challenged—A Finding Recognized by Both the District Court and the Majority in the Original Panel Decision.

The *Mahaffey II* majority first ignored the explicit factual finding of the Illinois Supreme Court that the state trial judge had gone "into a detailed analysis of the jurors" the State struck from the jury (App. H20)—a

finding recognized by the District Court and the majority in *Mahaffey I*. (*See* App. E46 where District Court notes that "the heart" of the trial judge's ruling was his "detailed analysis of the jury selection process, one in which he, rather than counsel, put questions to the venire"); (App. C16 where *Mahaffey I* majority notes that the trial judge "conducted a painstaking, thoroughly detailed analysis" of the *voir dire* which "spanned seven days," and "only then concluded that Mahaffey was unable to establish discriminatory motive"). The *Mahaffey II* majority ignored this factual finding without first making the requisite determination that it was "not fairly supported by the record." The majority's disregard of this finding also demonstrates its refusal to acknowledge that it was in fact the trial judge who was in the best position to conduct such an observation-based analysis of the veniremen and the jury selection process at Respondent's trial.

2. The Majority in *Mahaffey II* Also Ignored All of the Explicit Factual Findings Made by the Trial Judge With Respect to the Challenged Jurors, All of Which Related to their Ability to Serve on the Jury in Respondent's Particular Case.

The *Mahaffey II* majority also ignored the following specific factual findings which the state trial judge made regarding the stricken jurors:

> a. When, during the original *voir dire* questioning, certain jurors raised some doubt regarding imposition of the death penalty, the State excused them—four whites and two blacks—even though they eventually stated they could be fair and follow the law, (BH Tr.[6] 52);

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[6] "BH Tr." refers to the record from Respondent's *Batson* hearing which was filed in the Seventh Circuit.

b. Of those veniremen who stated that they had previously heard of the case, five were black, four were white, and all were excused by the State. (BH Tr. 52);

c. Of those accused of a crime, two were white, one was black, and all three were excused by the State. (BH Tr. 52);

d. Three blacks and one white were either ill or taking medicine, and all were excused by the State. (BH Tr. 52);

e. Two blacks and two whites were excused by the State who strenuously raised the question of hardship. (BH Tr. 52);

f. One white and two blacks raised a question regarding whether they believed the defendant had to do something to prove his innocence, and all were excused by the State. (BH Tr. 53);

g. One black and one white indicated that they had some type of case in court at some time, and both were excused by the State. (BH Tr. 53);

h. One black and two whites, who stated that they would give added weight to police testimony, were excused by the State even though they subsequently indicated they would follow the law. (BH Tr. 53); and

i. Five whites and two blacks, who indicated they were victims of crime, were excused by the State. (BH Tr. 53).

It was error for the *Mahaffey II* majority to ignore these explicit factual findings, which showed that there were reasons apparent from the record, unrelated to race, which justified challenging the stricken jurors.

3. The *Mahaffey II* Majority Further Ignored the Fact, As Found by the Illinois Supreme Court, that the Trial Judge Had Used His Experience, As Well As His Superior Knowledge of Local Conditions and Prosecutors, In Determining that the State Was Not Motivated By Discriminatory Intent.

The *Mahaffey II* majority further failed to consider the state trial judge's unequivocal statement that he was personally familiar with one of the prosecutors and knew that the man was not, as *Batson* phrased it, "of a mind to discriminate." The judge stated on the record that he had a "great deal of experience" with one of the trial prosecutors, . . . and that he had "never found [him] to be one who practiced any type of discrimination at all . . . [and that] [h]e is not that type of person." (BH Tr. 46-47). This finding was considered by the Illinois Supreme Court in concluding that the trial judge had "used his experience, as well as his superior knowledge of local conditions and prosecutors, in determining that the State's peremptory challenges were not motivated by impermissible racial-group bias." (App. H28). Once again, the majority ignored these findings without first making the required determination that they were "not fairly supported by the record."

E. The *Mahaffey II* Decision, Which Relies Almost Exclusively on the Sheer Number of Minorities Challenged in Finding that, "As a Matter of Law," Respondent Established A *Prima Facie* Case, Along With Decisions of the Second Circuit, Conflicts With Decisions of the First, Tenth, Third, and Eighth Circuits.

The *Mahaffey II* majority appeared to justify its complete disregard for the state trial judge's findings by pointing out that "the most important factor of this case, and one that the Illinois courts were too quick to overlook

is that all seven African-American members of the jury venire were excused by the State, meaning that not a single member of Mahaffey's own race was seated on the jury that decided his fate."[7] (App. A9). Based on these numbers, the majority found that it was "plainly . . . evident" that a pattern of strikes[8] was made against the African-American jurors. (App. A10).[9]

Although a pattern of challenges is a relevant circumstance in the *Batson* equation, it is certainly not the only relevant circumstance. Indeed, the *Batson* Court itself stated that a "pattern of strikes" was "merely illustrative"

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[7] There were 12 African Americans on the venire (18% of the venire), but five were excused for cause. (BH Tr. 53). A black woman was accepted as an alternate juror. (App. H19).

[8] It should be noted that at no time in either state or federal court, has Respondent ever argued that the State exercised a pattern of strikes against the black veniremen. *See People v. Mahaffey*, 539 N.E.2d at 1184. His main assertion has been simply that because all seven African-American veniremen were stricken, he established a *prima facie* case.

[9] Citing no legal authority, the majority also criticized the state trial judge for comparing the excused African Americans to the excused whites, when he "should have been comparing the excused African-Americans to the jurors who remained, for only through such a comparison could the judge assess whether race played any role in the State's challenges." (App. A11). However, nowhere in *Batson*, or any of its progeny, has this Court suggested that only through such a comparison can it be determined whether the proponent of the challenges exercised them in a discriminatory manner. In addition, the majority's finding that it was "significant" that the trial judge found that the whites who sat on Respondent's jury were similar to the African Americans who were excused (App. A12) is misleading. What the trial judge did, before specifically analyzing why each venireman, black or white, had apparently been challenged, was to note that "[a]ll the people who were excused were similar to the people who were chosen," in terms of vocation, gender, marital status, etc. (BH Tr. 51). This is a far cry from finding that the whites who sat on Respondent's jury were similar to the African-Americans the State excused, as the majority suggested.

when determining whether a *prima facie* case had been established in a given case. 476 U.S. at 97.[10] *See also* Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 *J. Crim. L. & Criminology* at 35-37 (stating that numbers "are relevant to the *prima facie* determination, but they are not, nor should they be," in and of themselves determinative").

The decision of the *Mahaffey II* majority, in relying almost exclusively on the number of black veniremen excused by the State, conflicts not only with *Batson* itself, but with decisions of the First, Third, Eighth, Ninth and Tenth Circuits. *See United States v. Bergodere*, 40 F.3d at 516 (First Circuit case holding that "[a] defendant who advances a *Batson* argument ordinarily should 'come forward with facts, not just numbers alone'"); *United States v. Esparsen*, 930 F.2d 1461, 1467 (10th Cir. 1991) (holding that "[b]y itself, the number of challenges used against members of a particular race is 'not sufficient to establish or negate a *prima facie* case'"); *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987)[11] (finding that striking

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[10] *Batson* involved the exclusion of every African American on the venire—four total—which resulted in an all-white jury. 476 U.S. at 83. However, at no time did the Court find that those numbers constituted a "pattern" of strikes, or that the prosecution's use of those challenges was sufficient, in and of itself, to establish a *prima facie* case of discrimination. If the Court had made such a finding, it would have presumably remanded the case for a second-stage, rather than first-stage, hearing. *See* 476 U.S. at 100 (case remanded to trial court to determine if *prima facie* case had been established).

[11] *But see Turner v. Marshall*, 63 F.3d at 813 (Ninth Circuit case finding *prima facie* case established when prosecution used five of its nine peremptory challenges to strike African Americans from the jury, and distinguishing *Vaccaro* on the basis that the defendant there relied only a pattern of strikes and no other means by which to establish an inference of discrimination, and

(continued...)

all blacks (two) on the venire failed to satisfy the *Batson* requirement); *United States v. Dawn*, 897 F.2d 1444, 1448 (8th Cir. 1990)[12] (finding that "numbers alone are not sufficient to establish or negate a *prima facie* case"); and *United States v. Clemons*, 843 F.2d 741, 746 (3rd Cir. 1988)[13] (finding that "establishing some magic number or percentage to trigger a *Batson* inquiry would short-circuit the fact-specific determination expressly reserved for trial judges").

The Second Circuit, however, has routinely rendered decisions finding that numbers alone are indeed sufficient to establish a *prima facie* case under *Batson*. *See United States v. Alvarado*, 923 F.2d 253, 256 (2nd Dist. 1991) (holding that a challenge rate nearly twice the likely minority percentage of the venire establishes a *prima facie* case despite the fact there was "no indication that any of the prosecution's questions and statements during *voir dire* revealed evidence of discriminatory intent"); *United States v. Ruiz*, 894 F.2d 501, 505-06 (2nd Cir. 1990) (prosecutor's use of three of its six peremptories to strike three out of four Hispanic venirepersons establishes *prima facie* case). *See also McCrory v. Henderson*, 871

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[11] (...continued)
that the finding of lack of "pattern" was premised on the view that "just two" challenges does not establish a pattern (*id.* at 813 n.3)).

[12] There appears to be a conflict within the Eighth Circuit, *see United States v. Battle*, 836 F.2d 1085, 1085-86 (8th Cir. 1987) (*prima facie* case made when prosecutor used five of its six peremptories to strike five of seven African-Americans from jury panel).

[13] There also appears to be a conflict within the Third Circuit, *see Jones v. Ryan*, 987 F.2d 960, 971 (3rd Cir. 1993) (prosecutor's use of three of his seven available peremptories to strike three of four African-American venirepersons establishes *prima facie* case).

F.Supp. 597, 603 (W.D.N.Y. 1995) (statistical evidence can suffice to make a *prima facie* showing); *United States v. Santopietro*, 809 F.Supp. 1016, 1019 (D. Conn. 1992) ("Numbers alone may suffice to establish the requisite inference of discrimination.").

Petitioner respectfully requests that this Court resolve the confusion over whether numbers alone are sufficient to establish a *prima facie* case under *Batson*—confusion which has arisen even though *Batson* itself expressly requires courts to look to *all* the relevant facts and circumstances in assessing whether an inference of discrimination is shown.

II.

IN THE ALTERNATIVE, IF THE TRIAL JUDGE DID IMPROPERLY FIND THAT RESPONDENT FAILED TO MAKE A *PRIMA FACIE* SHOWING OF INTENTIONAL DISCRIMINATION, THEN, BASED ON THE SUFFICIENCY OF THIS RECORD, THE SEVENTH CIRCUIT COULD HAVE CONDUCTED ITS OWN STEP-TWO AND STEP-THREE INQUIRIES UNDER *BATSON*.

In the original panel decision, the majority determined that "the fact that the state trial judge couched his finding in the context of a '*prima facie* case' is of no consequence" in that "the prosecution bypassed this stage by proffering its non-discriminatory reasons" for challenging certain jurors. (App. C15). The *Mahaffey I* majority consequently concluded that the trial judge had decided the ultimate question of discriminatory intent, a finding of fact reviewed with great deference on appeal, and rejected Respondent's *Batson* claim. (App. C17).

Upon rehearing, the *Mahaffey II* majority found that the state trial judge had not actually considered the State's proposed reasons for the challenges and, consequently, held that the only issue before the court was whether the *prima facie* showing was met. (App. A7). The majority

further noted that "this conclusion would be mandated in any case" because Respondent never had an opportunity to address the State's rationale for excluding the African-American jurors and, therefore, it would be "inappropriate" to proceed on appeal to the ultimate issue of discrimination. (App. A7-8).

True, the state trial judge, the Illinois Supreme Court and the District Court all agreed that Respondent had not advanced beyond the first stage of the *Batson* inquiry. However, as the *Mahaffey I* majority recognized, the record in this case supports a finding that the prosecutor indeed offered race-neutral justifications, apparent of record. At the *Batson* hearing, the prosecutor referred to various pages of the record which supported the State's reasons for exercising challenges against each juror, including, but not limited to: the jurors' attitudes on the death penalty; their potential inability to follow the court's instructions on the law; their criminal records and prior experience with the police; their youthful age; their apparent reluctance to serve on the jury; or their prior knowledge of the case. (BH Tr. 20-24). Moreover, as the *Mahaffey I* majority also noted, the prosecutor further indicated that, in light of the evolving nature of the jury selection process, the State had used a "sliding scale of scrutiny" in determining whether or not a juror would be chosen or excluded. (App. C9). In other words, "[r]easons which may have existed at the very beginning of this jury selection may have been amended, excluded, or changed due to the composition of those already selected, the number of challenges used and the overall composition, or the overall totality of the circumstances concerning that individual juror's background." (App. C9).

In rebuttal, Respondent's counsel argued that the State had not only argued against a *prima facie* showing, but had offered its non-discriminatory justifications as well. (App. C10). Counsel stated, "'I believe, your Honor, the prosecutor has crossed over from the first stage into the

second stage and has offered a great deal of explanation on why there was in fact no exclusion of Blacks on grounds of race.'" (App. C10). Counsel then argued that some of the prosecutor's asserted justifications were pretextual, but requested further opportunity to respond to the State's proffered race-neutral reasons for the challenges. (App. C10).

This Court's per curiam opinion in *Purkett v. Elem* implicitly ratified the Eighth Circuit's decision in that case to evaluate on its own whether the State had satisfied step two of the *Batson* inquiry, even though the state trial judge had held only that the defendant failed at step one. 514 U.S. at 775-76 (Stevens, J., Breyer, J., dissenting). Justices Stevens and Breyer expressed their belief that this was the "correct resolution" of a "tricky procedural problem," but opined that it "deserves more consideration than the Court has provided." *Id.* The two justices also noted that if a reviewing court is able to evaluate whether the prosecutor satisfied step two, then "a new problem arises": "Who may evaluate whether the prosecutor's explanation was pretextual under step three of *Batson*?" *Id.* Again, they indicated that whether the reviewing court decides the question, or refers it back to the trial court, "should depend on the state of the record." *Id.*

The *Mahaffey I* majority concluded that the record in the present case is more than adequate to allow evaluation of the step-two and step-three inquiries under *Batson*.[14] It stated, "as should be apparent from our lengthy recitation of the *Batson* hearing proceedings," the State provided its race-neutral justifications for the use of its peremptory challenges. (App. C12-13). The majority fur-

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[14] In fact, the majority even determined that, notwithstanding the other various courts' findings to the contrary, the trial judge had indeed conducted the step-two and step-three inquiries himself.

ther noted that this fact was indeed recognized by Respondent's counsel at the *Batson* hearing, who stated that the prosecutor had crossed over from the first stage into the second stage and offered a great deal of explanation as to why the challenges were not racially motivated, as well as by the Illinois Supreme Court, who concluded that "the State gave its criteria for challenging the seven black veniremen, asserting the criteria applied to all veniremen, without regard to race." (App. C13-14).

It is the opinion of two members of this Court that "[u]nless a reviewing court may evaluate such [race-neutral] explanations when a trial court fails to find that a *prima facie* case has been established, appellate or collateral review of *Batson* claims will amount to nothing more than [a] meaningless charade. . . ." *Purkett*, 514 U.S. at 776. The Petitioner, therefore, respectfully requests that the petition for certiorari be granted in order that the full Court may address and clarify this aspect of *Batson* jurisprudence and settle the procedural problem of whether a reviewing court may, if the record is sufficient, conduct the step-two and step-three inquiries if it determines that the trial judge improperly failed to find that a *prima facie* showing was met.

CONCLUSION

Petitioner respectfully requests this Court grant certiorari to review these significant issues dealing with claims brought pursuant to *Batson* and its progeny, to resolve the conflicts which have arisen in connection with these issues, to provide a clear exposition of the standards and procedures which should guide the various state and federal courts in adjudicating *Batson* claims, and to recognize

the importance of the State's interest in finality in a case in which the sentencing order was entered fourteen years ago.

Respectfully submitted,

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